IN THE SUPREME COURT OF OHIO

IN RE : COREY SPEARS,
A MINOR CHILD

CASE NO: 06-1074
On appeal from the Fifth
Appellate District, Licking County,
Case No. 2005-CA-93

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE

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EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUITONAL QUESTIONS AND MATTERS OF PUBLIC AND GREAT GENERAL INTEREST

This case should be accepted for review by this Court because it presents a substantial constitutional question regarding the due process rights of minors, specifically the knowing, intelligent and voluntary waiver of rights, in delinquency proceedings. The issues raised by this case are also matters of public and great general interest because they implicate the integrity of the juvenile court process, and suggest the need for additional guidance for trial courts regarding the waiver of counsel by children.

C.S. was thirteen (13) years old at the time he was adjudicated as a delinquent child by a juvenile court in Licking County for two counts of Grand Theft, felonies of the 4th degree, and a probation violation. He entered admissions to all charges and was committed to the Ohio Department of Youth Services for a minimum of sixth months on each charge, maximum of his twenty-first birthday, with commitments imposed consecutively. C.S. was unrepresented throughout the course of the proceedings. He could spend up to seven (7) years incarcerated without having had the benefit of counsel, and without having been afforded adequate due process of law to ensure his waiver was knowingly, intelligently and voluntarily made.

The appellate court decision failed to afford C.S. due process of law when it incorrectly held that the trial court "substantially complied" with Juv. R. 29 and did not violate the Appellant's constitutional rights. The court held that admissions made by C.S. to the charges were given knowingly, intelligently and voluntarily and that the trial court obtained a valid waiver of Appellant's rights. Juveniles such as C.S. routinely give up their right to counsel in Ohio without receiving adequate explanation of what the right to counsel means to them or why

they might choose to exercise that right. By giving up this right, children like C.S. expose themselves to greater consequences, both short term and long into their future.

Because juveniles typically have less knowledge and experience to aid them in legal understanding and decision making, there is a need for courts to protect and preserve their constitutional and other legal protections more than adults. Further, the demographics of youth in Ohio's juvenile justice system shows a disproportionate number of youth with significant mental health issues and other disabilities that impact upon decision making and cognitive abilities. This case provides the court with an opportunity to consider the implications of social science research and national trends in policy in clarifying a standard that is appropriate for youth who waive their right to counsel.

Despite a plethora of Ohio case law on the waiver issue, Ohio appellate courts have yet to establish a firm standard for what constitutes a knowing, intelligent and voluntary waiver of rights by a juvenile. A majority of states makes it difficult, if not impossible, for juveniles to waive their right to an attorney in delinquency proceedings. This court can be guided by the case law and statutes adopted by a host of other states, as well as national trade organizations, such as the National Council of Juvenile and Family Court Judges (NCJFCJ), which strongly disfavor waiver of counsel in general. As such, Amici Curiae respectfully requests that this Court accept jurisdiction of this case in that it presents substantial constitutional questions and matters of public and great general interest.

STATEMENT OF THE INTEREST OF AMICI CURIAE

Amici Curiae are the Children's Law Center, Inc., the American Civil Liberties Union of Ohio (ACLU of Ohio) and the National American Civil Liberties Union, Racial Fairness Program.

The Children's Law Center, Inc. has as its mission to protect the rights of children in Ohio and Kentucky through legal representation, research and policy development, and training and education of attorneys and others regarding the rights of children. The Center previously released a report in March of 2003 entitled "Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio." The Center strives to ensure that youth receive the due process protections to which they are entitled, and seeks to enhance the capacity of the public defender programs designed to ensure that the right to counsel is protected and that children receive effective assistance of counsel at all critical stages.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit and nonpartisan organization with over 450,000 members. It is the oldest and largest organization dedicated to the protection of civil liberties as embodied in the United States Constitution and the Bill of Rights. The ACLU frequently appears in court both as direct counsel and as *amicus curiae*.

The American Civil Liberties Union of Ohio, with over 25,000 members and supporters, is the Ohio affiliate of the ACLU. It, too, frequently appears in court as direct counsel and as *amicus* in support of principles of fairness, due process, and fundamental liberty set forth in the federal Constitution and also in the Ohio Constitution. None of these organizations has any relationship to the individuals involved in this litigation.

STATEMENT OF THE CASE AND FACTS

Amici Curiae hereby adopt the Statement of Case and Facts set forth in the Memorandum of the Petitioner. Amici address only Petitioner's Second Proposition of Law, and pose its own Proposition of Law as discussed below.

ARGUMENT

Petitioner's Second Proposition of Law

Waiver of Counsel by Children Should be Permitted only Upon Strict Compliance with Constitutional Safeguards that can Ensure that Waiver is Knowing, Intelligent and Voluntary, and Thus Comports with the Due Process Requirements of the Fifth and Fourteenth Amendment to the United States Constitution, and Article I, Section 16 of the Ohio Constitution.

In a series of cases decided nearly forty years ago, the United States Supreme Court recognized that juveniles facing delinquency proceedings are entitled to be treated fairly given the adversarial nature of those proceedings. The guiding principle of these cases is that juveniles often require the same fundamental procedural safeguards as adults. Like adults in criminal cases, juveniles in delinquency matters must often argue against detention, challenge facts presented by the state, confront witnesses and take other positions that are adversarial to the state's interests. Recognizing that the Constitution requires fundamental fairness in delinquency proceedings, the Court held that due process rights guaranteed in the Constitution were applicable to juvenile court proceedings in certain contexts, including the right to the assistance of counsel in preparing and submitting a defense. *See Kent v. United States*, 383 U.S. 541 (1966) (holding that juvenile hearings must "measure up to the essentials of due process and fair treatment"); *In re Gault*, 387 U.S. 1 (1967) (the Fourteenth Amendment requires a right to counsel in delinquency proceedings); *In re Winship*, 397 U.S. 358 (1970) (proof beyond a reasonable doubt is the required standard in delinquency proceedings); and *Breed v. Jones*, 421 U.S. 519 (1975) (adjudication in Juvenile Court puts youth in jeopardy for purposes of the Double Jeopardy Clause).

In *In re Gault*, 387 U.S. 1 (1967), the Supreme Court recognized the applicability of the Fourteenth Amendment's Due Process Clause to juveniles in delinquency proceedings. The Court held that, in adjudicatory stage of the delinquency proceeding, a juvenile had the right to counsel, among other due process rights. The Court noted that the "juvenile needs the assistance

of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him'" *Id.* At 36, quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

In cases following *Gault*, many courts, including Ohio courts, have adhered to the notion that juveniles should have largely the same protections as adults in stages of the proceedings that extend beyond those considered by the Court in *Gault*. *See* e.g., *In re Doyle* (1997), 2nd Dist., 122 Ohio App. 3d 767 (referring to Gault as finding that "there is no material difference with respect to the constitutional right to counsel between adult and juvenile proceedings."). Also see *John L. v. Adams*, 969 F.2d 228 (6th Cir. 1992).

Because the due process requirement of the right to counsel in the juvenile context is the very bedrock of our constitutional principles, cases addressing the standards for constitutionally-valid waivers of that right require courts reviewing waivers to make a complete and searching inquiry into the facts and circumstances surrounding the competency of the person articulating the waiver and whether the waiver itself was made knowingly and voluntarily. The jurisprudence with respect to constitutionally valid waivers of the right to counsel initially arose in the adult Sixth Amendment context. In those cases, and as the underlying principles have been extended to juveniles, courts have consistently articulated not only a strong presumption against waiver, but also high standard by which courts must judge whether individual waivers, once articulated, are constitutionally sound.

The Supreme Court has stated, "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Where a person convicted in state court has not intelligently and understandingly waived the

benefit of counsel and where the circumstances show that his rights could not have been fairly protected without counsel, the Due Process Clause invalidates his conviction. *Moore v. Michigan*, 355 U.S. 155, 161 (1957).

Ohio courts have found that the adult, federal standard of waiver of the right to counsel applies to juveniles in the state, requiring that waiver must be voluntary, knowing and intelligent. See *State v. Gibson* (1976), 45 Ohio St. 2d 366, *In re Nation* (1989), 61 Ohio App. 3d 763, and *In re Johnston* (2001), 142 Ohio App.3d 314. Similarly, Ohio courts have ruled that the record must reflect the waiver. *In re Solis* (1997), 124 Ohio App. 3d 547 (case reversed and remanded where there was journal entry of a waiver but no record of respondent's voluntary, intelligent waiver at dispositional hearings, even though he had an attorney for his adjudication hearing).

In 1996 Ohio amended *Juv. R.* 37 to require a transcript of all juvenile proceedings, after an appellate court found that a short journal entry was sufficient to establish a waiver of counsel. *In re East* (1995), 105 Ohio App. 3d 221, 663 N.E. 2d 983. Ohio requires that more attention be given to juveniles than adults, in regard to voluntariness and understanding, *Ohio v. Davis* (1978), 56 Ohio St. 2d 51, 54, and to scrutinize waiver more in juvenile than adult cases. See e.g. *In re Johnston* (2001), 11th Dist., 142 Ohio App. 3d 314.

A growing body of social science research has emerged to further support the proposition that children have less knowledge and experience to aid them in legal understanding and decision making and need courts to protect and preserve their constitutional and other legal protections more than adults. Research indicates that"[c]hildren and adolescents are developmentally different from adults, and those developmental differences need to be taken into account at all stages and in all aspects of the justice system, and most particularly, in the provision of counsel." Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54

FLA. L. REV. 577, 637 (Sept. 2002). Due to these developmental differences, the Supreme Court has explained that the "status of minors under the law is unique." *Bellotti v. Baird*, 443 U.S. 622, 633 (1979). "In situations where adults see several choices, adolescents may see only one." Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 27 (Summer 2000).

Other studies indicate that children, particularly children in the juvenile justice system, are less likely than adults to appreciate the consequences of the decisions they make in court. For example, one recent study by Thomas Grisso, a leading authority on the ability of children to waive the right to counsel, examined the legal decision-making processes for court-involved children. Researchers orally presented a group of 98 court-involved children from the ages of 9 – 17 with 36 commonly used legal words and phrases from a Massachusetts plea form and asked each child whether they thought they knew them. If so, they were asked to define the word. Even educated and experienced children failed to correctly define 86% of the legal terms, none of the children could correctly define "disposition," and only three could define words such as "plea" and "waiver." Only seven correctly defined "counsel" (lawyer), and only nine correctly defined the word "right." Thomas Grisso et al., *Juveniles Competence to Stand Trial: A Comparison of Adolescents and Adults Capacities as Trial Defendants*, LAW AND HUMAN BEHAVIOR Vol. 27. No. 4 (Aug. 2003) at 333-363. The study concluded that adolescents "are more likely than young adults to make choices that reflect a propensity to comply with authority figures," and less likely or less able to recognize risks inherent in their choices. *Id.* at 333-363.

In the same study, it was discovered that juveniles age 14 and under "demonstrate incompetence to waive their rights to silence and legal counsel as do 15 and 16 year olds who have IQ scores of 80 or below." Of those who have higher IQ scores, up to one half lack the

requisite competence to waive their rights. Juveniles below average intelligence are more likely than others to be impaired in abilities relevant to legal decision making. This risk is amplified in the juvenile justice system because a high proportion of youths are of below-average intelligence. *Id.* at 333-363. Grisso also recommended that older juveniles should be prohibited from waiving counsel. *Id.* Based on their findings, Grisso and Scott recommend a per se exclusionary rule for all juvenile waivers. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 172-173 (1997).

The demographics of children in Ohio's juvenile justice system suggest that, like their counterparts nationally, they cannot effectively navigate the complex and adversarial juvenile justice system on their own. For example, roughly 75% of incarcerated youth need mental health services. NAMI Ohio, *To Lift the Burden: Reducing the Costs of Untreated Mental Illness in Ohio Whiel Improving Care* (April 2005) at 3-4. At least 44% of youth committed to the Ohio Department of Youth Services have special education, as compared to 14% of children in the general Ohio school population, and 10% of children nationally. Ohio Coalition for the Education of Children with Disabilities, *Students with Disabilities Over-represented in Juvenile Justice System: Does Disability = Delinquency?* Vol. XXII, Issue 4 (Nov-Dec 2004) at 1. Nearly half of these youth are emotionally disturbed, while roughly 24% have a specific learning disability and 22% have cognitive disabilities. *Id.* at 2.

Courts should permit a child to waive his right to counsel only if the child is in the presence of counsel at the time of the waiver, and prior to the waiver, has consulted with counsel about the role counsel can play in a juvenile delinquency proceeding, and only if a determination is first made that the waiver is knowing, intelligent and voluntary. In determining knowing,

intelligent and voluntary, the court should consider and place specific written findings in the record with respect to whether or not the child fully comprehends:

1) the nature of the allegations and the proceedings and range of possible dispositions;
2) the right to assistance of counsel without charge if the family is financially unable to obtain counsel;
3) that even if the child intends not to contest the charge, counsel may be of substantial assistance in developing and presenting materials that could effect the disposition;
4) the child's right to obtain counsel at any stage of the proceedings; and
5) that the child's rights at any hearing include the right to call witness on the child's behalf, offer evidence on the child's behalf; cross examine witnesses; obtain witnesses by compulsory process, and require proof beyond a reasonable doubt in juvenile delinquency proceedings.

The facts in this case clearly show that C.S. had an unrealistic perception of what would happen as a result of waiving his right to counsel and proceeding to disposition. The record shows that C.S.' motivation was to be placed in the same detention center as his younger brother. Clearly C.S. did not fully appreciate the magnitude and consequences of his waiver of counsel and subsequent admission to the charges. The Due Process Clause of the Fourteenth Amendment requires that the waiver of counsel and other rights by C.S. be knowing, intelligent and voluntarily made, and that such findings be made on the record. Because adolescents like C.S. are less likely than adults to appreciate the consequences of their decisions, and they need greater protection than their adult counterparts, this Court should grant jurisdiction and adopt the Petitioner's Second Proposition of Law.

Proposition of Law of Amici Curiae

A Majority of Other States has Taken Steps to Ensure Meaningful Access to Counsel by Restricting Waiver through Statutory Provisions and/or Case Law; Further Support for Restricting Waiver is Found in the Positions of Several National Organizations.

Since the 1967 decision in *Gault*, many state legislatures and state courts have addressed the right to counsel issue for youth in delinquency proceedings, and in general have moved in the

direction of providing greater protection to safeguard this right. A majority of states makes it difficult, if not impossible, for juveniles to waive their right to an attorney in delinquency proceedings, and provide clear standards regarding the waiver of counsel. Mirroring this trend, a number of national trade organizations, including the National Council of Juvenile and Family Court Judges (NCJFCJ) strongly disfavor waiver of counsel by juvenile defendants. Thus, by adopting a clear, explicit standard for trial judges to follow in reviewing waiver of counsel, this Court would be adopting a majority viewpoint in the protection of the rights of juvenile defendants.

Ohio Rules and statutes, as well as judicial practices regarding waiver of counsel afford less protection to children than the majority of states that have recognized the many problems associated with allowing a juvenile to waive their right to counsel. Currently, Ohio prohibits the waiver of counsel only where the court is considering relinquishing jurisdiction for purposes of criminal prosecution. Juv. R. 3.

In recent years, there has been a clear national trend to ensure that children have meaningful access to counsel and are able to make informed decisions about their legal representation. In fact, all of Ohio's neighboring states have implemented such procedures. Some states expressly prohibit a juvenile from waiving their right to counsel at any stage of their proceedings, under any circumstances.[1] Nine states have implemented statutes that prohibit a juvenile from waiving counsel based on certain age requirements.[2] Fifteen states protect a child's right to counsel by mandating specific guidelines for waiver, such as permitting waiver to

[1] These states include Iowa (I.C.A. §232.11), New Mexico (32A-2-14(H) NMSA), North Carolina (NCJA 7B-2000), and Oklahoma (§10-24(A)(1).

[2] This includes Kansas (Attorney General of Kansas NO 94-53), Massachusetts (*Commonwealth v. Wertheimer*, 472 N.E. 2d, 266), Montana (MT ST 41-5-1413), New Jersey (N.J.S.A. 2A:4A-39(b)(1)(2), New Mexico (32A-2-14(H) NMSA), North Carolina (NCJC §7B-2000), Oklahoma (§10-24(A)(1), West Virginia (W.Va. Code §45-5-9(2), and Wisconsin (W.S.A. 938.23(1m)(a).

occur only in the presence of, and after consultation with, counsel.[3] These statutory safeguards are extremely important because children who forgo counsel are more likely to admit to the charges against them, even though they may be innocent or have meritorious defenses. More recently, Pennsylvania has taken the important step of prohibiting a juvenile's parent from waiving the child's right to counsel without proper consultation with an attorney.[4]

The trend for prohibiting juvenile waiver of counsel shows no sign of slowing. Last year in 2005, at least nine (9) of state legislatures introduced new juvenile waiver bills affording greater protection to children.[5]

State courts have also overwhelmingly accepted the proposition that juvenile defendants must have meaningful access to counsel. An examination of reported case law since the *Gault* decision indicates that one-hundred twenty-nine (129) appellate decisions have addressed the issue of waiver of the right to counsel by juvenile defendants. Of these decisions, one-hundred seven (107) overturned the waiver.[6] Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts,* 54 FLA. L. REV. 577, 609 (2002).

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[3] This includes Colorado (J.F.C. 660 P.2d 7), Connecticut (*In re Manual*, 543 A.2d 719 (1988), Indiana (IC 31-32-5-1(1)-(3), Kansas (Attorney General of Kansas NO 94-53), Kentucky (KRS §610.060(2)(b), Louisiana (LCC Art. 810(A)(1)-(3), Massachusetts (*Commonwealth v. Wertheimer*, 472 N.E. 2d, 266), Maryland (MD Code §3-8A-20(b)(3)-(4) and Rule 11-106(b), Montana (MT ST 41-5-1413), New Jersey (N.J.S.A. 2A:4A-39(b)(1)(2), North Carolina (NCJC §7B-2000), Oklahoma (OK Statute §10-24(A)(1), Vermont (VT R FAM P Rule 6(d)(3)(A)-(D), Virginia (Va. Code Ann. §16.1-266(c)(3), and Wyoming (W.S. 14-6-222).

[4] 42 Pa C.S.A. §6337

[5] See, for example, Arizona (HB 2614), Connecticut (HB 6360), Florida (SB 1218), Georgia (SB 135), Illinois (SB 1953), Nebraska (LB 112), Texas (SB 662), Vermont (HB 306), and Virginia (HB 2670).

[6] See Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts,* 54 Florida Law Review 577, 609 (2002), but note that the 99 appellate cases cited in this article follow In re Gault and continue through September 2001. An update of that research found another 29 appellate cases, with 26 overturning waiver and 3 affirming waiver. Reported cases decided since the end of the law review research and continuing through March 2006, in reverse chronological order, are as follows: *In re B.M.S.*, 165 Ohio App. 3d 609, 2006-Ohio-981,

The data also indicated that Ohio courts were responsible for fifty-two of these appeals, overturning waiver in thirty-six, and affirming waiver in sixteen. *Id.* 656,659, and 661-62. The only other state that compared to the number of cases in Ohio was Florida, which was responsible for thirty-seven appeals; all thirty-seven resulted in the waivers being overturned. *Id.* at 651-54.

In spite of the large number of reversals, however, appellate courts have not devised a clear standard to guide trial court judges in evaluating whether the juvenile knowingly, voluntarily, and intelligently waived the right to counsel. Some appellate courts have provided a list of specific steps that must be taken in order for waiver to be valid, requiring that the trial judge inform the juvenile individually of the nature of the charges, the range of allowable punishment, the available defenses and mitigating factors, and all other facts necessary for the juvenile to fully understand the entire proceeding. *See*, for example, *In re Manns*, 9th Dist., 2002-Ohio-85, WL 22879, and *In re Styer*, 3rd Dist., 2002-Ohio-6273, WL 31555992. Another court required the judge to engage the juvenile in a "meaningful dialogue," *In re Vaughters*, 8th

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_N.E.2d_; *In re R.B.*, 2nd Dist., 2006-Ohio-264.; *C.V. v. State* (2005), Fla. App. 2nd Dist., 915 So. 2d 664.; *C.K. v. State* (2005), Fla. App. 2nd Dist., 909 So. 2d 602.; *In re William B.*, 6th Dist., 163 Ohio App. 3d 201, 2005-Ohio-4428, 837 N.E.2d 414.; *T.H. v. State* (2005), Fla. App. 2nd Dist., 899 So. 2d 504.; *J.R.I. v. State* (2005), Fla. App. 1st Dist., 898 So. 2d 1093.; *K.E.N. v. State* (2005), Fla. App. 5th Dist., 892 So.2d 1176.; *In re Estes*, 4th Dist., 2004-Ohio-5163, WL 2260510.; *D.K. v. State*, Fla. App. 4th Dist., 881 So. 2d 50.; *In re Kindred*, 5th Dist., 2004-Ohio-3647, WL 1534135.; *In re Christopher H.* (2004), 359 S.C. 161, 596 S.E.2d 500.; *In re Amos*, 3rd Dist., 154 Ohio App. 3d 434, 2003-Ohio-5014, 797 N.E.2d 568.; *N.M. v. State* (2003), Ind. App., 791 N.E.2d 802.; *A.L. v. State* (2003), Fla. App. 4th Dist., 841 So. 2d 676.; *In re Bays*, 2nd Dist., 2003-Ohio-1256, WL 1193787.; *In re Styer*, 3rd Dist., 2002-Ohio-6273, WL 31555992.; *In re Vaughters*, 8th Dist., 2002-Ohio-5843, WL 31401623.; *In re Husk*, 4th Dist., 2002-Ohio-4000, WL 1803698.; *In re Stanford*, 9th Dist., 2002-Ohio-3755, WL 1627917.; *M.Q. v. State* (2002), Fla. App. 5th Dist., 818 So. 2d 615.; *In re Ratliff*, 12th Dist., 2002-Ohio-2070, WL 745370.; *State v. Riggins* (2002), 180 Or. App. 525, 44 P.3d 615.; *In re Kash*, 12th Dist., 2002-Ohio-1425, WL 471178.; *State v. B.P.* (2002), Fla., 810 So. 2d 918.; *State v. Rodriguez* (2002), 274 Ga. 728, 559 S.E.2d 435, 2 FCDR 365.; *In re Manns*, 9th Dist., 2002-Ohio-85, WL 22879.; *State v. T.G.* (2001), Fla., 800 So. 2d 204.; *D.R. v. Commonwealth* (2001), Ky. App., 64 S.W.3d 292.

Dist., 2002-Ohio-5843, WL 31401623, while another invalidated waiver after finding that the trial court did not "substantially comply" with Rules 29(B)(3) and 29(B)(5). *In re Bays*, 2nd Dist., 2003-Ohio-1256, WL 1193787, ¶10. Even courts that have affirmed the waiver of counsel did not supply a workable standard, with one court merely stating, without further discussion, that the trial court had conducted a "comprehensive inquiry." See *In re Stanford*, 9th Dist., 2002-Ohio-3755, WL 1627917, ¶17.

The most helpful example found in Ohio decisions comes from the Seventh District Court of Appeals. That court reviewed a waiver of counsel case in which the trial court permitted waiver after a performing a limited colloquy and obtaining signatures on a waiver form with boilerplate language. *In re Royal* (1999), 132 Ohio App. 3d 496, 505, 725 N.E.2d 685, 691. Overturning the waiver and subsequent admission, the court emphasized that the "rights dialogue of Juv.R. 29(B) is mandatory . . . [and] the court has a duty to make an inquiry to determine that the relinquishment is . . . voluntarily, knowingly, and intelligently made." *Id.* at 503, 690. Furthermore, while noting that the trial court needs only to substantially comply with Juv.R. 29(D) when evaluating admissions, the court stated that the trial court must comply with the mandatory provisions of Rule 29(B) by conducting a thorough investigation that includes information regarding the nature of the offense, available punishments, defenses, and mitigating circumstances, and other essential facts, as well as an inquiry regarding the juvenile's age, education, mental capacity, and prior criminal experience. *Id.*

Florida courts have also consistently reversed waiver, requiring trial judges to adhere strictly to the statutory language governing waiver of counsel found in Fla. R. Juv. P Rule 8.165(b). Florida courts have interpreted the statute governing juvenile waiver of counsel as requiring the judge to inform the juvenile of benefits lost by and danger/disadvantages of

representing himself, to determine if waiver was made voluntarily and intelligently, and to determine whether any unusual circumstances would preclude the juvenile from exercising waiver. See *C.K. v. State* (2005), 2nd Dist., 909 So. 2d 602, 604. In addition to failing to conduct such a thorough inquiry, trial judge's allowance of waiver also has been overturned in situations where the judge failed to comply with specific provisions of the Florida rule, such as the requirement of offering counsel at every stage of the proceeding even if the juvenile had previously waived counsel. *Id.* at 604. Finally, while Florida courts generally reiterate all, or at least part of, the rule regarding waiver of counsel, *K.E.N. v. State* (2005), 5th Dist., 892 So. 2d 1176, 1178-79, courts also "emphatically pointed out that Rule 8.165 is not merely procedural," noting that the "inquiry is not an annoying perfunctory task . . . [and] is not to be rushed through." *Id.* at 1179. Thus, Florida courts have used their large number of appeals to state firmly and consistently the standard that trial judges must apply in order for juvenile waiver of counsel to be valid.

Other state courts that have reviewed juvenile waiver of counsel have also provided a comprehensive standard for trial judges to follow. The Kentucky Court of Appeals, for example, interpreted its statute on juvenile waiver of counsel as permitting waiver only after the court has appointed counsel and the juvenile has consulted with that counsel regarding the issue of waiver. *D.R. v. Commonwealth* (2001), Ky. App., 64 S.W.3d 292, 296-297. South Carolina courts, while having no statute on juvenile waiver, extended similar protections to juvenile defendants by allowing waiver only after the trial judge has advised the juvenile of his right to counsel, warned the juvenile adequately of the dangers of self-representation, and conducted an inquiry made up of ten factors, including the defendant's age and education, previous involvement in criminal trials, previous, if any, consultation with counsel regarding waiver, possible defenses, and

knowledge of the nature of the charges, among others. *In re Christopher H.*(2004), 359 S.C. 161, 167-68, 596 S.E.2d 500, 503-04. Ohio courts should follow the lead of these states, as well as others, in promulgating a clear, comprehensive standard governing juvenile waiver of counsel.

Finally, the national trend in restricting juvenile waiver of counsel has been recognized by several national organizations. The Institute of Judicial Administration, the American Bar Association, the American Council of Chief Defenders, and the National Juvenile Defender Center have all taken the position that children should never be permitted to waive appointment of counsel. Robert E. Shepard, Jr., *Juvenile Justice Standards: A Balanced Approach*, (January 2005) at 255. Last year, the National Council of Juvenile and Family Court Judges published guidelines which state in part that "juvenile delinquency court judges should be extremely reluctant to allow a youth to waive the right to counsel and in the rare occasion that the waiver may be granted, the court should only accept the waiver of counsel after the youth has consulted with an attorney about the decision and still continues to desire to waive the right." National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005) at 14.

CONCLUSION

Further review of the Judgment of the Licking County Court of Appeals, Fifth Appellate District is warranted. As such, this Court should accept jurisdiction and adopt the two propositions of law as stated here by amici.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing document has been served upon the following person, by regular U.S. mail on this 1st day of June, 2006:

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FILED

FIFTH APPELLATE DISTRICT 2006 APR 17 AM 9:07

LICKING COUNTY, OH
GARY R. WALTERS

IN RE: COREY SPEARS,
A MINOR CHILD

JUDGMENT ENTRY

CASE NO. 2005-CA-93

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed in part and vacated in part and this case is remanded to the trial court for further proceedings consistent with this Opinion. Costs to be equally divided between appellant and appellee.

JUDGE W. SCOTT GWIN

JUDGE JOHN W. WISE

JUDGE WILLIAM B. HOFFMAN